DIRECTOR OF FOREST, SARAWAK V TR SANDAH TABAU ('SANDAH'): JUDICIAL CURTAILMENT OF NATIVE CUSTOMARY RIGHTS IN MALAYSIA?

by Yogeswaran Subramaniam

BACKGROUND

Malaysia's three Indigenous minority groups, namely, the natives of Sabah and Sarawak and the Orang Asli of Peninsular Malaysia enjoy express yet distinct levels of constitutional recognition and privileges,[1] partly due to their different political and legal histories arising from their respective interaction with outsiders. Notwithstanding these differences, the past two decades have seen the Malaysian courts develop their own brand of common law jurisprudence recognising the continued enforceability of the pre-existing rights of Indigenous people relating to lands and resources, founded upon common law jurisprudence on the subject, including the landmark Commonwealth decisions in *Mabo v Queensland [No 2]* ('*Mabo*')[2] and *Calder v AG* ('*Calder*').[3] Subject to extinguishment by plain and obvious legislative words, these rights exist independent of legislation[4] while their nature depends on the practices and usages of the particular Indigenous community.[5]

In late 2016, the Malaysian Federal Court, by a majority of 3 to 1, allowed the appeals of the Sarawak State government and other appellants and dismissed two *Iban native* customary claims in respect of areas held under the customs of *pulau galau* (reserved forests areas) and *pemakai menoa* (an area encompassing the wider customary territory) that extended beyond areas held under custom of *temuda* (covering felled, cultivated or settled areas).[6] Notwithstanding the dismissal of the native claims, the diverse views of the highest court in *Sandah* on the spatial extent of customary lands and resources legally claimable by Sarawak natives under the common law carry broader consequences for Indigenous lands and resources in Malaysia, and generally, informs the advocacy of Indigenous rights.

THE APPEAL AND ARGUMENTS

In effect, *Sandah* concerned three appeals which involved the State government of Sarawak and its relevant land and resource administrators ('the State appellants') and a private corporation ('Rosebay') as appellants and two distinct groups of *Iban* native claimants as respondents. Earlier, the High Court (the court of first instance) and the Court of Appeal had allowed both native customary rights ('NCR') claims under the *Iban* customs of *pulau galau* and *pemakai menoa*, which were held to be legally recognised under the common law. The appellants were granted leave to pose identical questions of law to the Federal Court which can be summarised as follows:

1. Whether native laws and customs at common law included rights to land in the virgin/primary forests reserved for food and forest produce which natives had not felled or cultivated?
2. Whether the lower courts were entitled to uphold a claim for NCR to land in Sarawak based on a native custom to land (namely, *pemakai menoa* and/or *pulau galau*) which was neither proven to be pre-existing nor reflected or recognised in any of the Orders made and legislation of the State of Sarawak?
3. Whether the Court of Appeal's observation in *Superintendent Of Lands & Surveys, Bintulu v Nor Anak Nyawai* ('*Nor Nyawai*')[7] that NCR was confined to the area where natives settled (*temuda*) and not where they foraged for food (*pemakai menoa* and/or *pulau galau*) was correct in relation to the extent and nature of land rights claimed under NCR in Sarawak?[8]

Due to the common question of law in all three appeals, the appeals were jointly heard by the Federal Court on 9 September 2015.[9]

The State appellants' contention focused mainly on the fact that, unlike the Iban custom of *temuda*, the customs of *pulau galau* and *pemakai menoa* had never been sanctioned or recognised in any of the written laws or executive orders of Sarawak and as such were not 'customs and usages having the force of law' within the meaning of the term 'law' defined in ~~art~~ 160 of the Federal Constitution.[10] Article 160 defines 'law' to include 'written law, *the common law in so far as it is in operation in the Federation*…, and *any custom or usage having the force of law in the Federation*…'. It was therefore submitted that the judicial observation in *Nor Nyawai* for NCR in Sarawak to be confined to settled areas (meaning, *temuda*) was established law.[11] Rosebay, the private holder of a

lease granted by the Sarawak government, essentially adopted the State appellants' arguments.[12]

The native respondents argued that there was ample evidence of the existence and practice of Iban customs of *pulau galau* and *pemakai menoa* and occupation of the claimed areas, and that previous Malaysian common law jurisprudence including *Nor Nyawai* had held that these rights existed independently of statute and should be construed in a complementary manner with written laws.[13] As the 'common law' also formed part of the definition of 'law' under ~~art~~ 160 of the Federal Constitution, these customs should be legally enforceable.

In light of the Malaysian common law principle that Indigenous customary rights do not owe their existence to statutes and that the customs of each individual community is a question of fact, the respondents further argued that there was no cogent reason to exclude unsettled areas from a customary rights claim *as a matter of law* unless such customs did not form part of the particular Indigenous communities' occupation and usage of their customary lands *as a matter of fact*.[14] The respondents also contended that the observation in *Nor Nyawai,* that NCR in Sarawak should be limited to settled areas for fear that a 'vast area of land' could be subject to such rights 'simply through assertions by some natives that they and their ancestors had roamed or foraged the areas in search of food', was unfounded and bordered on judicial policy making.[15]

THE DECISION AND LEGAL ANALYSIS

More than a year later, the Federal Court allowed the appeals by a majority of 3:1 on 20 December 2016. Of the five judges on the panel, one judge had retired in the meantime leaving reasoned grounds for the remaining four members.

Answering the first two legal questions in the negative, Raus PCA (as he then was) (with Ahmad Maarop FCJ concurring) held that the pre-existence of rights under native laws and custom which the common law respected were limited to felled, cultivated or settled areas (effectively, the *Iban* custom of *temuda*) and that the Courts were not entitled to uphold any claim for the wider customary territory and in the virgin/primary forests not felled, cultivated or settled (meaning the *Iban* customs *pemakai menoa* and *pulau galau* respectively).[16]

The primary ground for this conclusion was because these rights had not been 'recognised' by the laws of Sarawak.[17] In arriving at this finding, Raus PCA appeared to have confined himself to construing the specific written laws, edicts and executive orders of Sarawak[18] because in his Honour's view, 'customs which the laws of Sarawak recognise' and 'customs and usages having the force of law' were limited to laws and orders from the legislature and executive.[19] Despite implicitly excluding those customs recognised through the common law by the courts, it is noteworthy that Raus PCA had affirmed the Peninsular Malaysia cases of *Adong bin Kuwau v Kerajaan Negeri Johor*[20] ('*Adong*') and *Sagong bin Tasi v Kerajaan Negeri Selangor*[21] ('*Sagong*'),[22] decisions which had earlier recognised Peninsular Malaysia *Orang Asli* customary rights at common law, including rights to foraging areas, notwithstanding that there had been no prior legislative or executive sanction for such rights in this jurisdiction.[23] In this regard, Raus PCA's position on the common law in Peninsular Malaysia was possibly justifiable due to the separate legal histories of Sarawak and Peninsular Malaysia.

Perhaps more ambiguously, Raus PCA affirmed the legal correctness of *Nor Nyawai* that NCR in Sarawak should not extend to foraging areas[24] and in doing so observed that this observation was consistent with the landmark domestic decisions in A*dong* and *Sagong* and other Commonwealth jurisprudence which had held that native customary rights over land were grounded upon the '*concept of native's custom of continuous occupation*'.[25] Notwithstanding that Indigenous customary rights at common law are arguably rooted in the 'traditional connection' with the area claimed rather than 'occupation',[26] Raus PCA's observations nonetheless suggest that foraging rights can be proven by a 'custom of continuous occupation'. This suggests *a factual inquiry* which was established in the *Adong* case and more pertinently, the lower courts preceding the instant appeals. Following this logic, the correct inquiry on the enforceability of these customs would have been to determine the factual existence and practice of the 'custom of continuous occupation' instead of limiting the examination to written laws and executive orders. It is equally notable that *Nor Nyawai* is also the leading Sarawakian case for, amongst other things, the proposition that NCR at common law '*do not owe their existence to statutes*', a principle also departed from by Raus PCA in determining the legal recognition and enforceability of *pulau galau* and *pemakai menoa*.

Raus PCA also opined that the Federal Court decision recognising Indigenous customary rights at common law in *Superintendent of Land & Surveys Miri Division v Madeli bin Salleh* ('*Madeli*') [2008] 2 MLJ 677 was limited to cleared, cultivated or settled lands occupied by natives or *temuda*, which had been recognised by written laws.[27] While the facts of *Madeli* indeed involved cultivated customary lands, the Federal Court there expressly affirmed the general principles from *Mabo* and *Calder* that the courts will assume that native property rights are to be fully respected upon any acquisition or change in sovereignty and that by the common law, the Crown may acquire a radical or

ultimate title to the land subject to any native rights over such land.[28] A mere change in sovereignty does not disturb pre-existing private (including communal)[29] native rights under their customs.[30] More specifically, *Mabo* conclusively rules that an express sovereign act recognising such pre-existing customary rights is unnecessary as these rights are presumed to continue to exist unless and until lawfully extinguished or terminated.[31] Earlier in his grounds, Raus PCA had also referred to *Mabo* emphasising that the 'nature and incidents of native title must be ascertained as *a matter of fact*' with reference to native laws and customs.[32] Nevertheless, Raus PCA appears to have adopted a regressive approach to common law NCR by requiring that pre-existing native customs be expressly recognised by subsequent enacted law and established as *a matter of law* before they possess the 'force of law'.

In dissent, Zainun FCJ took a broader view of the constitutional definition of 'law' under ~~art~~ 160 and observed that there were aspects of Malaysian law including native customary rights that were only contained in case law and 'there was no reason why they should be excluded from any understanding of what 'law' is'.[33] Answering the first question in the affirmative and accordingly seeing no reason to answer the second question,[34] Zainun FCJ held that the fact that neither *pemakai menoa* nor *pulau galau* were contained in the written law of Sarawak would not preclude the recognition of these rights under the common law as it was 'the cornerstone of judge-made law in the entire common law world' for something to have 'the force of law' if it were to be recognised by the common law.[35] Furthermore, such customs were *sui generis*, did not find their roots in statute and were neither expressly contained nor excluded by codified laws.[36]

In respect of the first question, Zainun FCJ explicated the domestic jurisprudence contained in *Adong* and *Sagong* and other established common law precedent, noting the 'varying dimensions' of NCR, which could include 'usufuctuary rights, communal title, individual title and any forms of interest in the land', depending on the 'degree of connection to the land'.[37] The issue was therefore 'an issue of proof of customary practices' as a matter of fact rather than determining whether 'customs appear in a statute book'.[38] After revisiting the local jurisprudence, Zainun FCJ consequently found that the observation in *Nor Nyawai* that NCR should be confined to settled areas (the third question) was a 'misconception' with 'no conceptual basis', further observing that the statement appeared 'to be judicial policy making'.[39] In doing so, Zainun FCJ also highlighted that the Court of Appeal in *Nor Nyawai* had left intact the High Court's finding on the recognition of the *pemakai menoa* and had affirmed the application of general common law NCR principles, including the proposition that such rights did not owe their existence to statutes.[40]

The fourth judge, Abu Samah Nordin FCJ, formed the majority in allowing the appeals based on insufficient evidence before the court.[41] In respect of the questions of law posed to the court, Abu Samah Nordin FCJ found it unnecessary to answer them citing the lack of sufficient proof as a justification.[42] This determination is remarkable considering that His Honour had earlier applied the law in a similar manner to Zainun FCJ in holding that the NCR of *pemakai menoa* and *pulau galau* under the 'common law' pursuant to ~~art~~ 160 of the Federal Constitution was *not a matter of law but a question of fact* to be established by evidence.[43]

Sandah reinforces the proposition that the development of Indigenous rights through the courts carries a degree of unpredictability and is subject to regress through judicial conservatism.

COMMENTARY

The majority decision in *Sandah* is pending review by the Federal Court, a procedure that is fruitful only in exceptional cases. In the meantime, the obvious division of the apex court on the extent of the application of common law NCR raises legal and practical uncertainties for future dispute. While Raus PCA's reasoning (for common law NCR to be sanctioned by the sovereign power before legal recognition) can be justified as a strict interpretation of the constitutional meaning of 'law', it fails to adequately address the heart of *Madeli*'s common law recognition of Indigenous customary rights, namely, that the pre-existing rights of Indigenous peoples under their own laws and customs *continue to exist without sovereign recognition* unless they are extinguished by plain and obvious legislative intent. This ambivalence opens the issue of whether this finding could apply to other Malaysian jurisdictions, particularly Peninsular Malaysia, where there has been no executive and legislative recognition of Orang Asli customary land and resource rights. That said, all three judgments in *Sandah* affirmed the Peninsular Malaysia decision of *Adong*, a case on foraging rights, suggesting that the Federal Court unanimously intended for the common law in Peninsular Malaysia to remain unscathed by *Sandah*. If this is the case, it could be said that stronger constitutional and statutory recognition and protection of NCR in Sarawak, if compared to Peninsular Malaysia, has functioned adversely to curtail Sarawakian NCR rather than maintain them.

There are also more general lessons offered by *Sandah*. As seen in decisions from other jurisdictions, *Sandah* reinforces the proposition

that the development of Indigenous rights through the courts carries a degree of unpredictability and is subject to regress through judicial conservatism. In this respect, the strategy of sustained denial and resistance against common law NCR, as employed by the Sarawak government for more than 15 years, has culminated in a judicial precedent more consonant with State land and resource priorities and policies. *Sandah* also suggests that express constitutional recognition of Indigenous rights, actively pursued in jurisdictions such as Australia, is no guarantee of a liberal judicial interpretation of these rights. In contrast, the dissenting judgment of Zainun FCJ in *Sandah* can, as experienced in Canada through the minority Supreme Court decision in *Calder*, lay the foundation for stronger recognition of Indigenous rights in the future.

Yogeswaran Subramaniam holds a PhD from UNSW for his research on Orang Asli land rights and appeared as co-legal counsel for the native respondents at the Federal Court appeal.

1 See Yogeswaran Subramaniam, 'Affirmative Action and Legal Recognition of Customary Land Rights in Peninsular Malaysia: The Orang Asli Experience' (2013) 17(1) *Australian Indigenous Law Review* 103, 104-5.
2 (1992) 175 CLR 1.
3 (1973) SCR 313.
4 *Nor Nyawai* [2006] 1 MLJ 256, 269.
5 *Kerajaan Negeri Selangor v Sagong bin Tasi* [2005] 6 MLJ 289, 301-2.
6 *Director of Forest, Sarawak v TR Sandah Tabau* ('*Sandah*') [2017] 3 CLJ 1.
7 [2006] 1 MLJ 256.
8 *Sandah* [2017] 3 CLJ 1, [7].
9 Ibid [8].
10 Ibid [17]-[20], [85]-[89], [279].
11 Ibid [19].
12 Ibid [20].
13 Ibid [21]-[25], [90]-[94], [280].
14 Ibid [25], [94].
15 Ibid [23].
16 Ibid [79]-[80].
17 Ibid [66]-[67].
18 Ibid [58]-[77].
19 Ibid [66]-[67].
20 [1997] 1 MLJ 418.
21 [2002] 2 MLJ 591.
22 *Sandah* [2017] 3 CLJ 1, [29]-[41].
23 For a summary of the common law doctrine in Peninsular Malaysia, see Subramaniam, above n 1, 108-9.
24 *Sandah* [2017] 3 CLJ 1, [42]-[47], [70]-[75], [81].
25 Ibid [70].
26 Ibid [236]-[240] (Zainun FCJ).
27 Ibid [60]-[62].
28 *Madeli* [2008] 2 MLJ 677, [16]-[19].
29 Ibid [19]-[20].
30 Ibid [19].
31 *Mabo* [1992] 175 CLR 1, 54-7 Brennan J (Mason and McHugh concurring); 83-6 (Deane and Gaudron JJ), 182-4 (Toohey J).
32 *Sandah* [2017] 3 CLJ 1, [55]-[57].
33 Ibid [213].
34 Ibid [162], [215].
35 Ibid [213].
36 Ibid [177]-[214].
37 Ibid [96], [131]-[149], [232]-[236].
38 Ibid [149], [177].
39 Ibid [216]-[246].
40 Ibid [243].
41 Ibid [302]-[312].
42 Ibid [312].
43 Ibid [302]-[303].

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